

## Contract is key

The Commercial Agents (Council Directive) Regulations 1993 govern the relationship between agents and their principals. The need for a clear and tailored written agreement between them has become if anything, more important with the introduction of the regulations which introduced a statutory right for agents to be paid compensation (or an "indemnity" if the contract specifies this) from the principal on termination of the contract. This arises even where the agent terminates the contract "on the grounds of age, infirmity or illness".

The contract should specify whether compensation or indemnity will apply on termination. If it does not, compensation will be payable.

Indemnity payments are generally easier to work out in advance. They are payable if the following conditions are satisfied:

- New customers have been brought to the principal by the agent.
- The volume of business with existing customers has been significantly increased by the agent.
- The principal continues to derive substantial benefits from such business.
- The payment of an indemnity is equitable, having regard to all the circumstances and, in particular, the commission lost by the agent on contract termination.

Indemnity payments should not exceed one year of the agent's average remuneration over the preceding five years (or over the whole duration of the contract, if the period is less than five years).

Compensation is assessed at the value of the agency business on the date of termination. Depending on the sector and circumstances, this can be as high as three to six times the annual commissions.

We have recently dealt with a case where the agency provided \$100 million turnover for the principal with annual commissions of \$5 million. The agency agreement was terminated and the valuation of the agency was in the region of \$17 million and such a claim clearly has a significant impact on the financial position of the principal.

It is not permissible to contract out of or avoid the majority of the provisions in the regulations, but there are some useful areas where a suitably drafted written agreement can be used to modify their impact (to the advantage if either the principal or the agent as applicable).

For instance, from the perspective of principals, the contract can be used to:

- Exclude a claim for commission in respect of transactions concluded after termination of the contract but derived from the efforts of the agent prior to termination i.e. avoid regulation 8 claims which can be substantial.
- Specify that an indemnity payment rather than compensation is payable to the agent on termination, again thereby potentially reducing the principal's liability considerably.

From the perspective of agents, the contract can be used to:

- Agree longer minimum notice periods than those laid down in regulation 15.
- Expressly establish an exclusive agency relationship in respect of the applicable territory or goods and protect the agent accordingly.

A tactic sometimes employed to try to circumvent the regulations is to state that the governing law or the jurisdiction of the contract is that of a non-EU member state. However, as a result of two key decisions, such a tactic will no longer be successful. In *Ingmar GB Limited v Eaton Leonard Technologies Limited* the European Court of Justice held that an American exporter using an English sales agent could not contract out of the regulations, even though under the contract the parties had agreed to be the law of the state of California. The European Court of Justice has confirmed that where the agent carries on activity in the EU the provisions of the directive will apply.

In the case of *Accentuate Limited v Asigra Inc*, the English High Court went further and held that an agreement between the parties to use US State Law and make the contract subject to US arbitration will be invalid in many circumstances and accordingly, an EU agent will be free to bring a claim under the regulations in the Court of its home country.



Cobbetts can assist you as a principal or an agent in drawing up a suitable contract, or revising an existing one. Our team of experienced practitioners has prepared agency contracts for clients across the world. If a dispute has arisen in respect of an existing commercial agency contract, our specialist commercial agents dispute resolution team will be able to assist.

If you have a specific query in relation to the Commercial Agents Regulations contact:



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